Supreme Court, U.S.
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No. 10-___

IN THE

# Supreme Court of the United States

ADAM WILLIAMS

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## PETITION FOR A WRIT OF CERTIORARI

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November 3, 2010

## QUESTION PRESENTED

Whether a trial court's abuse of discretion in ignoring and failing to inquire into a defendant's concerns with his counsel and further silencing that defendant affects the integrity of the trial proceeding and renders it impossible for the court of appeals to quantify the effect of the error, such that the error is "structural" and thus harmless error analysis is not appropriate based on this Court's decisions in *Arizona v. Fulminante* and *United States v. Gonzalez-Lopez?*

## PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.

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Petitioner Adam Williams ("Petitioner"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on August 5, 2010.

## OPINION BELOW

The opinion of the court of appeals is reported at *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010), and is reproduced in the Appendix at 1a – 19a.

## JURISDICTION

The court of appeals issued its judgment on August 5, 2010 (App., *infra*, 1a – 19a). This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provision is the Sixth Amendment to the Constitution of the United States of America, which reads that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,

> and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

## STATEMENT OF THE CASE

This Court's jurisprudence has differentiated between two categories of constitutional errors that occur during criminal proceedings: trial errors and structural errors. The distinction lies not in the severity of the error, but in the type or nature of the error at issue. This Court has held repeatedly that trial errors are subject to harmless error analysis, whereas structural errors are not.

Trial errors have been defined as those errors which:

> [o]ccurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

*Arizona v. Fulminante,* 499 U.S. 279, 307-08 (1991).

Structural errors, on the other hand, are those which affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id. at* 310. Because these errors affect the integrity of the trial, they are unlike trial errors which can be "quantitatively assessed in the context of other evidence." *Id.* at 308. Harmless error analysis thus cannot be performed.

This Court's recent decision in *United States v. Gonzalez-Lopez* reiterated why harmless error review of structural errors is futile: "we rest our conclusion of structural error upon the difficulty of assessing the effect of the error." 548 U.S. 140, 149 n. 4 (2006). Thus, it is not that the error is so grave that harm is presumed, but rather that the nature of the error means that harm cannot fairly be evaluated. *Id.* at 149.

The error in the instant case was just such a structural error. The court of appeals, however, failed to apply the framework set out by this Court in both *Fulminante* and *Gonzalez-Lopez* to assess whether an error is structural, leading to this petition for certiorari.

Petitioner Adam Williams was arrested in April 2008 and charged with distribution of marijuana, distribution of cocaine base, possession with intent to distribute cocaine base, possession of a firearm by an individual formerly a convicted felon, and possession of a firearm in furtherance of drug trafficking. App., *infra,* 2a-3a. The charges stemmed from three separate alleged controlled buys involving a confidential informant who was wired for both audio and video. *Id.* at 2a.

As an indigent defendant, Petitioner was represented by appointed counsel at trial. Prior to trial, Petitioner sent a letter to Magistrate Judge Andrew Rodovich noting that he had not yet seen the audio and video evidence of the alleged controlled buys and wanted analysis to be performed on that evidence. *Id.* at 4a, n.2. Because Petitioner was

represented by counsel at the time, Magistrate Judge Rodovich denied the request.

Trial began in December 2008. At trial, Petitioner's defense to the drug distribution charges centered on the presence of a third party during the alleged controlled buys, the lack of credibility of the confidential informant, and the assertion that he was sharing drugs but not distributing drugs for sale. *Id.* at 3a-4a. During the first day of trial, the government introduced the videotapes that corresponded to the three alleged controlled buys. *Id.* at 4a. On the second day of trial, prior to the jury entering the courtroom, Petitioner asked the judge if he could say something. *Id.* at 4a-6a. Petitioner had not addressed the court at any prior point.

The exchange that followed was quoted in its entirety in the court of appeals' opinion, and with good reason. *Id.* After Petitioner expressed his concerns over the fact that his counsel had never shown him one of the videotapes that was presented to the jury, the judge told Petitioner that he was not trying the case on his own and that his current attorney was competent. App., *infra*, at 5a. Petitioner then told the judge "That's the point I'm trying to make. I feel like my lawyer has failed me." *Id.*

Confronted with such a statement, the trial judge did no follow-up whatsoever. *Id.* at 4a-6a. He asked no further substantive questions of Petitioner. *Id.* Neither did he ask any questions of Petitioner's counsel. *Id.*

The trial judge's only response to Petitioner was both dismissive and confusing: "Not yet. Too late. We're in the middle of a trial. We are going to go forward. I don't care -- at this stage. I really don't care what you think. You got it?" *Id.* at 6a. Aside from indicating that he understood, Petitioner followed the trial judge's admonition and made no further comment during the trial. *Id.*

At the close of the three-day trial, the jury found Petitioner guilty of five of the seven charges. *Id.* Petitioner was acquitted of possession of a firearm in furtherance of drug trafficking. App., *infra,* at 6a. More noteworthy, Petitioner was acquitted of one of the charges for which there was alleged videographic and audio evidence – distribution of marijuana. *Id.* In August 2009, Petitioner was sentenced to 135 months in prison.

On appeal before the Seventh Circuit, Petitioner raised three issues. The pertinent issue to this petition for certiorari was whether the trial court's complete failure to inquire regarding Petitioner's concerns with his counsel and the trial court's additional statements meant to dissuade from Petitioner from raising any future concerns constituted a structural error that merited reversal of his conviction.

In its brief the government conceded that the trial court had erred under Seventh Circuit law by failing to inquire into Petitioner's concerns with his counsel. The government argued that any such error was harmless because Petitioner had not shown prejudice in the manner required by this Court's

decision in *Strickland v. Washington*, 466 U.S. 668 (1984).

On reply, Petitioner argued that any prejudice or harmless error analysis was inapplicable because the trial court's failure to inquire and dismissive statements to Petitioner constituted a structural error based on the framework established by this Court in *Fulminante* and *Gonzalez-Lopez*. Specifically, the trial court's error was of a type that affected the integrity of the trial proceeding and left the court of appeals with no record on which to determine the extent of the harm caused by the error.

The failure to inquire issue was the only one addressed by the court of appeals at oral argument on May 18, 2010. On August 5, 2010, the court of appeals rendered its decision in the case on all three issues briefed by the parties, affirming the trial court. App., *infra*.

In its decision on the failure to inquire issue, the court of appeals first held that the trial court had abused its discretion by failing to inquire regarding Petitioner's concerns and "abruptly silencing" him. *Id.* at 7a. The court of appeals further held that the trial court's behavior could have "served to stifle what may have been legitimate concerns" about his counsel. *Id.* at 7a-8a. The court of appeals also noted that it was considering as an issue of first impression whether a trial court's total failure to conduct any inquiry into a defendant's concerns about his counsel was subjected to harmless error review. *Id.* at 8a. The court of appeals specifically held that "the district court's abuse of discretion will only result in a new trial if Williams can show prejudice. If not, then

any error was harmless." *Id.* The panel analogized the instant case to *United States v. Zillges*, a Seventh Circuit case dealing with a failure to inquire adequately. 978 F.2d 369 (7th Cir. 1992).

While the court of appeals mentioned structural error briefly, it did not otherwise reference the framework set out by this Court in its earlier decisions in *Fulminante* and *Gonzalez-Lopez*. In fact, neither case is mentioned by the court of appeals. Further, the court of appeals did not address the effect the error may have had on the integrity of the trial proceeding and the resultant inability to assess harm – that separates structural and trial errors. As a result, this petition for certiorari follows.

## REASONS FOR GRANTING THE PETITION

The court of appeals' decision below does not square with this Court's existing jurisprudence on structural errors and the framework for properly evaluating them. This Court has cautioned repeatedly that structural errors should be considered a limited class of constitutional errors for which harmless error analysis is inapplicable. As such, the lower appellate courts must apply this Court's framework in a manner that delineates between trial and structural errors.

This is especially true in the context of constitutional errors related the Sixth Amendment, which protects the right of all criminal defendants to counsel at certain critical stages of their criminal proceedings, including trial. In the instant case, the court of appeals ignores this Court's framework for analyzing structural error. Instead, the court of

appeals declares as a matter of first impression that despite the total failure to inquire by the trial court and resultant inability to analyze harm, the court would still subject petitioner to meeting the harmless error standard. App., *infra,* at 8a.

In doing so, the court of appeals analogizes the instant case to *Zillges,* an earlier Seventh Circuit case that was contemporaneous to *Fulminante* (but does not reference *Fulminante*) and that pre-dates *Gonzalez-Lopez. Id.* The court of appeals here should have looked to *Fulminante* and *Gonzalez-Lopez* as guideposts to evaluate whether the failure to inquire constituted a structural error.

Had the court of appeals evaluated the error below according to the framework set out by this Court, it would have reversed Petitioner's conviction. The error in Petitioner's case -- which the court of appeals agreed was an abuse of discretion -- is precisely the type of error which affects the integrity of the trial proceedings and for which harmless error analysis is inappropriate and impossible.

The court of appeals' approach below conflicts with decisions by other circuits that have held that harmless error analysis is inapplicable to cases of failures to inquire into a defendant's concerns with his attorney. These decisions are more consistent with this Court's jurisprudence on the topic.

Because of the importance of the structural error distinction and disagreement between lower appellate courts as to how to evaluate errors related to a failure to inquire, this Court's review is

warranted. Accordingly, this Court should grant this petition for certiorari.

## I. THE RULING BELOW FAILS TO FOLLOW THE FRAMEWORK SET OUT BY THIS COURT IN EVALUATING WHETHER CONSTITUTIONAL ERRORS ARE STRUCTURAL IN NATURE

In this Court's decision in *Arizona v. Fulminante*, the majority extended the harmless error rule of *Chapman v. California* to coerced confessions. 499 U.S. at 302 (discussing *Chapman*, 386 U.S. 18 (1967)). In doing so, the Court delineated between "trial errors" and "structural defects in the constitution of the trial mechanism." *Id.* at 291. Because the admission of a coerced confession was considered only a trial error, this Court still held the error was subject to harmlessness review. *Id.*

Though several Justices wrote opinions in the *Fulminante* decision, there is some consistency between them in terms of how they define the difference between trial and structural errors. A trial error is:

> [e]rror which occurred during presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

*Id.* at 307-08 (opinion of the court). On the other hand, structural errors are those which defy harmless error analysis because it is "impossible to assess the

effect on the jury." *Id.* at 291 (White, J., dissenting). The essence of what makes these particular defects "structural" is that they affect the trial proceedings in such a way that their harm cannot reasonably be assessed. *Id.* at 290.

This Court again addressed the distinction between structural and trial errors in *United States v. Gonzalez-Lopez,* in which this Court granted certiorari to consider whether an erroneous denial of the defendant's Sixth Amendment right to counsel of choice was subject to harmless error review. 548 U.S. at 143-44. This Court held that the denial of counsel of choice was a structural error that was not subject to harmless error review. *Id.* at 152.

In doing so, this Court echoed the reasoning from *Fulminante* that structural errors are distinct from trial errors because of their effect on the trial's integrity and resultant difficulty in assessing their effect or harm. *Id.* at 148-49. The Court in *Gonzalez-Lopez* clarified any ambiguity about the trial/error dichotomy by noting that "as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error." *Id.* at 149, n. 4.

This Court pointed to the "myriad aspects of representation" by counsel as bearing directly on the "framework within which the trial proceeds." *Id.* at 150, quoting *Fulminante,* 499 U.S. at 310. Under the Court's reasoning, erroneous deprivation of the counsel of choice "unquestionably qualifies" as structural error because it has "consequences that are necessarily unquantifiable and indeterminate." *Id.* at 150 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 282

(1993)). Harmless error analysis was impossible because it would be merely a "speculative inquiry into what might have occurred in an alternate universe." *Id.*

*Fulminante* and *Gonzalez-Lopez* confirm that the hallmark of structural error is the inability to assess the harm that results from the error due to its effect on the integrity of the entire trial proceeding. The court of appeals failed to address this critical distinction when considering the trial court's abuse of discretion in the instant case.

As mentioned above, the court below attempted to draw parallels between the instant case and the court's earlier decision in *Zillges,* where it had "determined that a failure to inquire was not a structural error requiring automatic reversal, but instead, was subject to the harmless error standard." App., *infra,* at 8a.

However, the *Zillges* court did not in any way evaluate or analyze how the error might have affected the integrity of the trial proceeding.[1] In light of this Court's existing jurisprudence on determination of structural errors, the court of appeals in the instant case should have relied on *Fulminante* and *Gonzalez-Lopez* for the proper legal

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[1] Additionally, as will be discussed in the next section, *Zillges* is factually distinct from the instant case in ways which are relevant to the determination of whether a failure to inquire can be structural error. For example, *Zillges* is a case where the trial court actually did inquire into the defendant's dissatisfaction, thereby providing some record with which to better assess harm.

framework to assess whether harmless error review should apply.

The court of appeals did not perform this required analysis. Petitioner argued below that the nature of the error in this case was precisely the type which defies harmless error analysis, relying on *Fulminante* and *Gonzalez-Lopez*. The court of appeals' opinion contains no discussion regarding the inherent difficulty in assessing the nature of the harm caused by the trial court's failure to conduct any inquiry and dismissal of Petitioner's concerns. This is especially surprising in light of the court of appeals' statements in the opinion that Petitioner was "abruptly silenc[ed]" and that the trial court's behavior "served to stifle what may have been legitimate concerns that Williams had about his attorney's performance." App., *infra*, at 7a-8a.

Accordingly, the court of appeals failed to apply the proper framework for evaluating and identifying structural error that has been set out by this Court. This Court should therefore grant certiorari to clarify the proper framework or method for determining when constitutional errors fit into this limited, but important, category of constitutional errors for which harmless error is inapplicable.

## II. HAD THE COURT OF APPEALS FOLLOWED THE PROPER FRAMEWORK FOR DETERMINING STRUCTURAL ERROR, IT WOULD HAVE REVERSED PETITIONER'S CONVICTIONS

Had the court of appeals followed the framework that this Court set out in *Fulminante* and

*Gonzalez-Lopez,* it would have found that the trial court's failure to inquire into Petitioner's concerns with his counsel in the instant case was a structural error to which harmless error review is inapplicable. The failure to inquire affected the integrity of the trial proceeding, making any resultant harm impossible to quantify. Thus, just as in *Gonzalez-Lopez,* harmless error analysis in the instant context would also be a "speculative inquiry into what might have occurred in an alternate universe." 548 U.S. at 150.

First, the trial court conducted absolutely no inquiry into Petitioner's concerns.[2] The inquiry was not merely brief or imperfect; it was wholly and inexplicably absent. Despite the relative brevity with which it could have been accomplished, no questions were asked of Petitioner or his appointed attorney, who was present. This is especially troubling given that Petitioner told the court, in response to a comment by the trial court that his counsel was competent, "[t]hat's exactly the point I'm trying to make. I feel like my lawyer has failed me." App., *infra,* at 5a. Despite the simultaneously serious and non-specific qualities of this statement, the trial court failed to ask a single follow-up question.

This failure to inquire deprived the court of appeals of any semblance of a starting point in the record in terms of assessing harm. *Gonzalez-Lopez* speaks to the "myriad aspects of representation" that

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[2] In fact, the court of appeals indicated that it had "never addressed a situation where a district court did not inquire into a defendant's concerns with his current attorney..." App., *infra,* at 8a.

can bear directly on the "framework within which the trial proceeds," but the trial court afforded Petitioner no opportunity to discuss any aspects of this representation. 548 U.S. at 150.

Numerous critical questions about this representation were left unaddressed. What was the scope of concerns that Petitioner had with his trial counsel? Had the relationship between Petitioner and his trial counsel deteriorated to the point that there was mistrust or a total breakdown in communication? Was Petitioner entertaining the notion of proceeding pro se because of the failures he perceived by his counsel? Was there other evidence introduced at trial to which Petitioner had been denied access?

These are just a few examples from a litany of potential issues that the court of appeals could not fairly assess because of the failure of the trial court to conduct any inquiry. Not only is it impossible to know what Petitioner might have said, but it is impossible to understand how that might have affected the trial going forward (or how it had already affected the first day of the trial). That leaves the appellate court with no record for evaluating harm. Any harmless error analysis would require the type of "speculative inquiry" into an "alternate universe" that *Gonzalez-Lopez* held makes harmless error analysis inappropriate. *Gonzalez-Lopez,* 548 U.S. at 150. The failure to inquire and stifling of Petitioner's concerns therefore created "consequences that are necessarily unquantifiable and indeterminate," and "unquestionably qualifies as structural error." *Id.* (quoting *Sullivan v. Louisiana,* 508 U.S. at 282).

*Zillges,* on which the court of appeals relies, is distinguishable because the court of appeals in that case had a record and analysis from the trial court to review. *Zillges* is more appropriately conceptualized as a case where the inquiry was incomplete or inadequate. While the trial court in that case could have done a *better* job of inquiring as to the defendant's concerns, the trial court did inquire into the defendant's concerns and thereby gave the court of appeals some basis for assessing the impact of those concerns as part of a harmless error analysis. First, Zillges had provided the trial court with specific objections to his counsel. *Zillges,* 978 F.2d at 370-71. Second, the trial court in *Zillges* not only engaged in two separate, albeit brief, colloquys with the defendant about his counsel, but also spoke directly with Zillges' attorney and permitted Zillges and his counsel an opportunity to discuss Zillges' concerns. *Id.* at 371. Third, the trial court then twice followed up with the defendant to ensure that he was satisfied, and explained in summary fashion why he was content with having Zillges proceed with his current counsel. *Zillges,* 978 F.2d at 370-71. *Id.* These minimal steps provided the court of appeals with some record to evaluate whether any potential harm accrued from the trial court's error. In the instant case, no such record exists.

Moreover, the trial court in the instant case did more than just fail to inquire. The trial court told Petitioner point blank: "We are going to go forward, I don't care -- at this stage, I really don't care what you think. You got it?" App., *infra,* at 6a. In the words of the court of appeals, the trial court's statements to Petitioner "abruptly silenc[ed] him" and also

"served to stifle what may have been legitimate concerns." *Id.* at 7a-8a.

Thus, not only was the court of appeals deprived of any record regarding Petitioner's concerns at the time that he attempted to raise his concerns with the judge, but the judge's dismissive comments to Petitioner prevented both the court of appeals and this Court from being able to evaluate any further concerns Petitioner may have had during the trial or how they might have affected the presentation of evidence, cross-examination of witnesses, or even Petitioner's own trial testimony.

The nature of the trial court's error -- both the failure to inquire and manner of stifling what may have been legitimate concerns – affected the integrity of the trial proceeding in a manner which made quantitative assessment of harm impossible. Such error is therefore structural under this Court's reasoning in *Fulminante* and *Gonzalez-Lopez.* Harmless error analysis does not apply and reversal is mandated.

## III. THE COURT OF APPEALS' ANALYSIS IN THIS CASE CONFLICTS WITH OTHER CIRCUITS' TREATMENT IN FAILURE TO INQUIRE CASES

The court of appeals' analysis below conflicts with the approaches taken by two other appellate circuits in failure to inquire cases. In those cases, because the nature of the error affected the proceedings in a way that left the appellate court with an inadequate record to evaluate harm, the Sixth and Ninth Circuits could not and thus did not

subject the lower court's error to harmless error review.

In *Benitez v. United States,* the Sixth Circuit considered whether the defendant's right to counsel was violated when the trial court failed to ascertain the basis for the defendant's concerns with his counsel, after the defendant had expressed dissatisfaction with his counsel at sentencing. 521 F.3d 625, 630-31 (6th Cir. 2008). The Sixth Circuit held in *Benitez* that the trial court's failure to inquire into the "source and nature of Benitez's dissatisfaction....violated his Sixth Amendment right to counsel." 521 F.3d at 636. A "violation of a defendant's right to counsel at a critical stage is a structural error, and is therefore not subject to an analysis of whether the error was harmless or prejudicial." *Id.* at 630.

The Sixth Circuit noted that:

> Had the district court inquired into Benitez's statements and made explicit findings, we could consider whether the court properly exercised its discretion in refusing to postpone the proceedings. But the record in this case simply does not allow for such an inquiry.

*Id.* at 635. The inability to assess the effect of the error on the sentencing proceeding therefore prevented the court of appeals in that case from fully ascertaining the propriety of the trial court's actions. However, because of the lack of record, the Sixth

Circuit still held that harmless error analysis was inappropriate.[3]

In *United States v. Torres-Rodriguez*, the Ninth Circuit "reverse[d] Torres' conviction in its entirety because of the trial court's failure to entertain Torres' motion for substitution of counsel." 930 F.2d 1375 (9th Cir. 1991), *overruled on unrelated grounds by Bailey v. United States*, 516 U.S. 137 (1995). In *Torres-Rodriguez*, the Ninth Circuit highlighted the fact that the trial court made "absolutely no inquiry," just as in Petitioner's case.[4] 930 F.3d at 1381.

The Ninth Circuit had "no way of knowing the nature of the defendant's complaint with his appointed counsel, because the trial judge foreclosed all explanations of any kind with regard to the motion to substitute." *Id.* The Ninth Circuit therefore did not conduct a harmless error analysis and reversed Torres-Rodriguez's conviction and remanded for a new trial. *Id.* at 1390.

In finding that the nature of a trial court's failure to inquire rendered them unable to perform harmless error analysis, the approaches taken by the

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[3] In *Benitez*, the Sixth Circuit reversed the judgment of the district court and remanded the case for consideration of a procedural issue -- whether Benitez was entitled to equitable tolling for his motion under 28 U.S.C. §2255. If the trial court determined that Benitez was entitled to equitable tolling, the sentencing hearing had to be redone.

[4] The Ninth Circuit also highlighted that the "record indicates that [the Ninth Circuit's] lack of knowledge is not the fault of Torres." 930 F.3d at 1381. Similarly, the Seventh Circuit was deprived of knowledge regarding the nature or extent of Petitioner's concerns through no fault of Petitioner.

Sixth and Ninth Circuits conflict with that taken by the Seventh Circuit. This Court should grant certiorari to resolve this circuit split.

## CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari.

Respectfully submitted,

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November 3, 2010

## APPENDIX A

**In the**
**United States Court of Appeals**
**For the Seventh Circuit**

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No. 09-3174

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
*v.*
ADAM WILLIAMS,
*Defendant-Appellant.*

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Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 2:08-cr-43—**James T. Moody**, *Judge.*

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ARGUED MAY 18, 2010 — DECIDED AUGUST 5, 2010

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Before O'CONNOR,[1] *Associate Justice*, and KANNE and ROVNER, *Circuit Judges*.

KANNE, *Circuit Judge*. Appellant Adam Williams appeals his conviction for illegal possession of a firearm and various drug distribution offenses. He argues that (1) the district court's failure to inquire into his concerns over his attorney's performance was an abuse of discretion; (2) the statute dispossessing felons of firearms, 18 U.S.C. § 922(g)(1), is unconstitutional; and (3) the district court's assessment of the sentencing factors in 18 U.S.C. §3553(a) was inadequate. We affirm.

## I. BACKGROUND

As part of a narcotics investigation, in early 2008 the Hammond, Indiana Police Department enlisted the help of a confidential informant ("CI") in making controlled purchases of crack cocaine and marijuana from Appellant Adam Williams. On three separate occasions, the CI, wearing audio and video recording devices, purchased narcotics from Williams. Based on this electronic surveillance, Hammond police officers obtained a search warrant for Williams's house.

In April 2008, officers arrived at Williams's home to execute the warrant. After knocking on the door to announce their presence and receiving no answer from within, the officers broke down the door. As one of the officers entered, he saw Williams approaching

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[1] The Honorable Sandra Day O'Connor, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

with a handgun pointed toward the doorway. As the other officers entered the house, Williams retreated to his bedroom and placed the gun on the ground a few inches from him. The officers then arrested Williams without incident.

The day after his arrest, federal agents from the Bureau of Alcohol, Tobacco, and Firearms went to the Hammond city jail to question Williams. After receiving his Miranda rights, Williams explained to agents that when the officers had arrived to execute the warrant, he believed that someone was breaking into his house in an attempt to rob him, which is why he had retrieved the gun from under his bed. He then proceeded to make various inculpatory statements during a videotaped interview. For example, Williams confessed to selling crack, but not marijuana (he claimed that he possessed the latter only for personal use). He told agents that he had been earning approximately $150 per week through his crack sales. Williams also made incriminatory statements about the use to which he put drug paraphernalia found at his home; he explained that he used rubber gloves when he was bagging drugs to keep the drugs out of his system.

Williams subsequently stood trial by jury. At trial, Williams testified in his own defense. He claimed never to have sold crack or marijuana to the CI despite his earlier confession to the contrary. Instead, he claimed that he and the CI had pooled their resources to purchase shared drugs from another dealer named "Casino." He also explained that his statement that he had been earning $150 each week from crack sales was "misunderstood" by federal

agents. Rather, he claimed that he had bought the crack to use as Christmas party favors, and after changing his mind, tried to recoup his expenses by selling the crack. He also tried to negate his inculpatory statement regarding the drug paraphernalia by explaining that it belonged to Casino, who did not live with Williams, but sometimes bagged his drugs in Williams's home. Finally, Williams testified that the handgun did not belong to him, but to his sister, who left it with him to use for his protection.

On the second day of trial, during the government's case-in-chief, Williams asked to speak to the judge outside of the jury's presence. Williams explained to the trial judge that he had not seen one of the video recordings until it was played by the prosecution, despite his request to review all of the video and audio recordings prior to trial.[2] The following exchange occurred:

| | |
|---|---|
| The Court: | Okay. . . . Counsel, are both of you ready to go? |
| [AUSA] Lanter: | Yes. |
| Williams: | Your Honor, can I speak? |
| The Court: | What do you want? |

[2] Two weeks prior to trial, Williams had written his attorney, asking his attorney to perform a video analysis of the CI's recordings. The record does not specify what this analysis would entail or whether this analysis was ever completed.

Williams: I feel that I would like for you to read this.

The Court: Why? Look, we are in the middle of a trial, sir.

Williams: Yes, sir. I understand. There's some things that has [sic] occurred in my case that I feel did not come out between me and my lawyer. I did not see the video of 3/25 until yesterday when it was shown to the jury, and I had requested to see all the audio, all the video.

The Court: Look, you have a lawyer. He's a very professional individual. You are not—

Williams: This is correct.

The Court: —trying this case on your own and you can't do that.

Williams: Yes, sir. I understand.

The Court: So that's just between you and him, sir.

Williams: That's the point I'm trying to make. I feel like my lawyer has failed me.

| | |
|---|---|
| The Court: | Not yet. Too late. We're in the middle of a trial. We are going to go forward. I don't care—at this stage, I really don't care what you think. You got it? |
| Williams: | Yes, sir. |
| The Court: | Good. Get the jury in. |

(App. at 8-9.) Williams expressed no further concerns after this exchange, and did not move for a new trial.

The jury acquitted Williams on one count of marijuana distribution and one count of possessing a firearm in furtherance of drug trafficking. But the jury found Williams guilty on one count of distributing marijuana, two counts of distributing cocaine base, one count of possessing with intent to distribute crack cocaine, and one count of possessing a firearm as a felon. Williams now appeals his conviction.

## II. ANALYSIS

### *A. Sixth Amendment Right to Counsel*

Williams first contends that the district court abused its discretion by declining to inquire further into Williams's expressed concerns over his attorney's performance. We held in *United States v. Zillges* that "[w]hen, for the first time, an accused makes known to the court in some way that he has a complaint about his attorney, the court must rule on the matter." 978 F.2d 369, 371 (7th Cir. 1992). If the

accused expresses the reasons for his concerns to the court, "the court may rule without more." *Id.* But if the accused does not state the reasons for his concerns, "the court then has a duty to inquire into the basis for the client's objection to counsel and should withhold a ruling until reasons are made known." *Id.* at 372; *see also United States v. Morris*, 714 F.2d 669, 673 (7th Cir. 1983).

*Zillges*, however, involved a defendant's express request for the appointment of new counsel. 978 F.2d at 371. Williams was not requesting a new attorney, but simply was expressing concerns over his current attorney. We have not yet had occasion to expound on *Zillges*'s application in the latter situation. Today, we do. We think that the reasoning in *Zillges* applies with equal force regardless of whether a complaint is phrased in terms of an express motion for a new attorney or simply in terms of dissatisfaction with one's current attorney.

The government admits that when construed liberally, Williams's comments lend themselves to the possibility that he was either requesting a new attorney or the permission to proceed pro se. The government therefore admits that the court should have inquired further into Williams's concerns instead of abruptly silencing him.

We agree. The district court declined to use the opportunity to inquire fully into Williams's perceived problems with his attorney. The district court's dismissal of Williams's concerns was an abuse of discretion, and served to stifle what may have been

legitimate concerns that Williams had about his attorney's performance.

Because we have never addressed a situation where a district court did not inquire into a defendant's concerns with his current attorney, we also have not had occasion to determine the effect of an abuse of discretion in those circumstances. We now hold that the district court's abuse of discretion will only result in a new trial if Williams can show prejudice. If not, then any error was harmless.

In *Zillges*, we analogized to *Strickland v. Washington*, 466 U.S. 668 (1984), in reaching our determination that "a district court's failure to conduct a sufficient inquiry into a substitution motion does not constitute reversible error unless it result[s] in a denial of this Sixth Amendment right." 978 F.2d at 372. We thus determined that a failure to inquire was not a structural error requiring automatic reversal, but instead, was subject to the harmless error standard. *Id.* at 372-73. To prevail, the defendant was required to "demonstrate that the performance of his attorney was not within the range of competence demanded of attorneys in criminal cases, and that but for counsel's deficiencies, the result of the proceeding would have been different." *Id.* (*citing Strickland*, 466 U.S. at 687, 694) (internal quotation marks omitted).

*Zillges* and *Strickland* guide our decision in this case. If a defendant who makes an express motion for substitute counsel must show prejudice to prevail on a district court's failure to inquire, then so too must a defendant who makes only an implicit motion.

Unfortunately for Williams, he is unable to satisfy *Strickland*'s burden. First, Williams is unable to show that his attorney's performance was incompetent. The only evidence he points to of incompetence is that his attorney did not review with him the video recordings prior to trial. And while standing alone this may potentially give rise to a possibility of deficient performance, when coupled with the actions that Williams's attorney *did* take, we cannot say that the attorney's performance was incompetent. For example, Williams's attorney knowledgeably questioned the witnesses, including Williams, about the recordings. During his closing argument, the attorney demonstrated his familiarity with the recordings, even commenting at one point about his extensive review of them. Because this evidence demonstrates Williams's attorney's preparation and review of the recordings, Williams has failed to show that his attorney's performance was deficient.

Second, even if Williams could demonstrate his attorney's incompetence, he is unable to establish a reasonable possibility that the results would have been different "but for" his attorney's allegedly deficient performance. We recognize that Williams was acquitted on one charge of marijuana distribution, so there is a small chance that the videos *may* have shown exculpatory evidence if Williams had the chance to review them prior to trial. But a remote possibility is different than the reasonable possibility required by *Strickland*. And the remote possibility presented here has even less

significance in light of the fact that the other evidence of Williams's guilt is overwhelming.

For example, because the video recordings were consistent with the other evidence presented at trial, there is nothing to suggest that they were inauthentic. And even if Williams is not arguing that the videos were inauthentic, but only that the videos did not demonstrate his guilt, the other evidence presented is to the contrary. The CI gave testimony about the controlled purchases, and the police officers who supervised the purchases testified as well. The government also presented samples of the drugs the CI purchased from Williams, other physical evidence seized from Williams's house, and Williams's own videotaped inculpatory statements. Under these circumstances, we cannot say that Williams demonstrated a reasonable possibility that he would have been acquitted but for his attorney's alleged deficiencies.

Because Williams cannot satisfy his burden under either prong of the *Strickland* standard, the district court's abuse of discretion was harmless. Therefore, his drug conviction will be affirmed.

*B. Second Amendment Right to Firearm Possession*

Williams next argues that the felon-in-possession statute, 18 U.S.C. § 922(g)(1), is unconstitutional as applied to him. Prior to trial, Williams moved to dismiss the charge against him for being a felon in possession of a firearm. As support for his motion, he cited the Supreme Court's recent decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), and our

panel opinion in *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *vacated and remanded*, No. 08-3770, 2010 WL 2735747 (7th Cir. July 13, 2010) (en banc). Based on *Heller*, Williams argued that the statute criminalizing his possession of a firearm as a convicted felon was unconstitutional because it infringed on his right to possess firearms for use in self-defense. The district court denied the motion, relying on *Heller*'s now-famous dictum that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." 128 S. Ct. at 2816-17. Williams appeals the denial of his motion. Reviewing *de novo* the district court's denial of Williams's motion to dismiss the indictment, *United States v. Greve*, 490 F.3d 566, 570 (7th Cir. 2007), we affirm.

Williams argues that because the *Heller* Court determined that the "core" ideal the Second Amendment protects is self-defense, the statute criminalizing his possession of a firearm is unconstitutional as applied to him. 128 S. Ct. at 2817; *see also McDonald v. City of Chicago*, No. 08-1521, 2010 WL 2555188, at *22 (U.S. June 28, 2010) (plurality opinion). Using our panel opinion in *Skoien* as support, Williams argues that the *Heller* dictum relied on by the district court should not be given so much credence. *Skoien* involved a challenge to the prohibition on firearm possession by misdemeanants convicted of domestic violence under 18 U.S.C. § 922(g)(9). Williams proffers that the now vacated analytical approach promulgated by the *Skoien* panel is the approach we should use in determining the scope of his rights.

That vacated opinion adopted a two-step approach to evaluate Second Amendment challenges. First, the panel determined that courts should examine whether the challenged conduct falls within the scope of the Second Amendment's protection in the first instance. If not, the challenged regulation is valid. If so, then the court must move on to step two, which requires courts to apply some level of "means-ends" scrutiny to establish whether the regulation passes constitutional muster. 587 F.3d at 808-09.

Thereafter, *Skoien* was reheard en banc. Without deciding the question of whether those convicted of violent crimes were outside the scope of the Second Amendment's protection at the founding, we determined in our en banc opinion that "some categorical disqualifications [on firearm possession] are permissible." *Skoien*, 2010 WL 2735747, at *3. To be permissible, however, we held that categorical exclusions must satisfy "some form of strong showing." *Id.* Finding that § 922(g)(9) satisfied this requisite "strong showing," we affirmed Skoien's conviction.

Because briefing and argument in Williams's case were completed prior to the en banc argument in *Skoien*, Williams anticipated a potential reversal of *Skoien*'s panel opinion, and so clarified in his reply brief that his argument was not dependent on our resolution of *Skoien*. Rather, he argued that *Heller* standing alone supported his as-applied challenge to § 922(g)(1). But we think that the en banc decision in *Skoien* is instructive, especially when read in conjunction with *Heller* and the Supreme Court's

most recent decision in *McDonald v. City of Chicago*, 2010 WL 2555188.

In *Heller*, the Court stated that "[a]ssuming that Heller *is not disqualified* from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." 128 S. Ct. at 2822 (emphasis added). This language indicates that the threshold inquiry is whether Williams is qualified to possess a firearm in the first instance. In the *Skoien* en banc opinion, we implicitly addressed this issue by beginning our analysis with a reiteration of *Heller*'s idea that some categorical exclusions of firearm possession are constitutional. 2010 2735747, at *3. This notion was also recently affirmed by the Supreme Court in *McDonald*, where it "repeat[ed] [its] assurances" that *Heller*'s dictum regarding disqualifications on firearm possession by felons was valid.2010 WL 2555188, at *25 (plurality opinion).

Based on these recent decisions and our reasoning in the *Skoien* en banc opinion, we need not address whether convicted felons fell outside the scope of the Second Amendment's protections at the time of the founding, as the *Skoien* panel opinion did. The academic writing on the subject of whether felons were excluded from firearm possession at the time of the founding is "inconclusive at best," *Skoien*, 2010 WL 2735747, at *11 (Sykes, J., dissenting), and we refrain now from making a determination based on contradictory views. Instead, as we must, we follow the en banc majority's holding that some categorical bans on firearm possession are constitutional. *Id.* at *3 (majority opinion); *see also United States v.*

*Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). For purposes of Williams's case, this means that if he falls within one of the categorical bans, the Second Amendment does not apply to him, assuming, of course, that the ban satisfies "some form of strong showing." *Skoien*, 2010 WL 2735747, at *3. One such categorical ban is on firearm possession by a convicted felon. *See McDonald*, 2010 WL 2555188, at *25 (plurality opinion); *Heller*, 128 S. Ct. 2816-17. And because Williams is a convicted felon, the ban applies to him.

But the government does not get a free pass simply because Congress has established a "categorical ban"; it still must prove that the ban is constitutional, a mandate that flows from *Heller* itself. *Heller* referred to felon disarmament bans only as "presumptively lawful," which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as applied challenge. Therefore, putting the government through its paces in proving the constitutionality of § 922(g)(1) is only proper. And to determine whether the presumption of lawfulness gives way in this case, we must apply *Skoien*'s "strong showing" requirement to § 922(g)(1) as that statute was applied in this case. In *Skoien* we declined to adopt a level of scrutiny applicable to every disarmament challenge, although we hinted that it might look like what some courts have called intermediate scrutiny. Consequently, for purposes of Williams's challenge to § 922(g)(1) as it applies to him, we can examine his claim using the intermediate scrutiny framework without determining that it would be the precise test applicable to all challenges to gun restrictions.

To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective. *Cf. Skoien*, 2010 WL 2735747, at *3. We find that the government satisfies its burden. In this case, the government's stated objective is to keep firearms out of the hands of violent felons, who the government believes are often those most likely to misuse firearms. *See*, Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 Harv. L. Rev. 511, 515 & n.24 (1982) (noting a study that found that felons convicted of robbery were among those most likely to commit future crimes); *see also Skoien*, 2010 WL2735747, at *3 ("Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court."); *cf. Landers v. State*, 299 S.E.2d 707, 709-10 (Ga. 1983) ("[T]he General Assembly sought to keep guns out of the hands of those individuals who by their prior conduct had demonstrated that they may not possess a firearm without being a threat to society."). We cannot say that this objective is not an important one. *Cf. Skoien*, 2010 WL2735747, at *3 ("[N]o one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective.").

We next must determine whether § 922(g)(1) is substantially related to this objective in Williams's case. The government attempts to show a substantial relationship between its objective of preventing felons

access to guns and § 922(g)(1) by pointing to Williams's own violent past. The government's evidence passes constitutional muster.

Williams was convicted of felony robbery. In Indiana, where Williams's conviction occurred, robbery is violent by definition. *See United States v. Lewis*, 405 F.3d 511, 514 (7th Cir. 2005). In fact, Williams's specific crime involved his beating the victim so badly that the victim required sixty-five stitches. (App. at 29.) The fact that Williams was convicted of a violent felony defeats any claim he has that § 922(g)(1) is not substantially related to preventing him from committing further violence.

And although we recognize that § 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent, that is not the case for Williams. Even if the government may face a difficult burden of proving § 922(g)(1)'s "strong showing" in future cases, it certainly satisfies its burden in this case, where Williams challenges § 922(g)(1) as it was applied to him. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) ("[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."). Williams, as a violent felon, is not the ideal candidate to challenge the constitutionality of § 922(g)(1).

We are further guided in our determination by the fact that every court to address the constitutionality of § 922(g)(1) in light of *Heller* has upheld that

statute. *See United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010) (per curiam); *Vongxay*, 594 F.3d at 1114-18; *United States v. Khami*, 362 F. App'x. 501, 507-08 (6th Cir. 2010) (unpublished); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010); *United States v. Stuckey*, 317 F. App'x 48, 50 (2d Cir. 2009) (per curiam); *United States v. Anderson*, 559 F.3d 348, 352 & n.6 (5th Cir. 2009), *cert. denied*, 129 S. Ct. 2814 (2009); *United States v. Brunson*, 292 F. App'x 259, 261 (4th Cir. 2008) (per curiam) (unpublished); *United States v. Irish*, 285 F. App'x 326, 327 (8th Cir. 2008) (per curiam) (unpublished).

Because Williams was convicted of a violent felony, his claim that § 922(g)(1) unconstitutionally infringes on his right to possess a firearm is without merit. We also note that our en banc decision in *Skoien* considered and disposed of an issue similar to Williams's equal protection argument, so we need not address it further. 2010 WL 2735747, at *6 ("True, the statute tolerates different outcomes for persons convicted in different states, but this is true of all situations in which a firearms disability . . . depends on state law.").

*C. Title 18 U.S.C. § 3553(a)'s Sentencing Factors*

Williams finally argues that the district court erred in applying the 18 U.S.C. § 3553(a) factors because the court failed to consider his non-frivolous sentencing arguments. We review a sentence for both procedural and substantive reasonableness under an abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007).

In this case, because Williams raises only a procedural argument, we need not consider the substantive reasonableness of his sentence. *Cf. United States v. Farris*, 532 F.3d 615, 620 (7th Cir. 2008) (declining to address the procedural argument when defendant raised only the substantive argument). A sentence is procedurally unreasonable when a trial court fails to give meaningful consideration to a defendant's non-frivolous sentencing arguments. *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005).

Williams contends that the district court erred by failing to address specifically his argument that he should receive a reduced sentence because of the crack-to-powder sentencing disparity. *See Spears v. United States*, 129 S. Ct. 840, 843-44 (2009). But the district court did address Williams's argument; it simply reached a conclusion with which Williams disagreed. Williams's primary evidence at sentencing was his contention that the Department of Justice generally acquiesces to variances in crack sentences when the defendant is not violent, is not a recidivist, and does not possess a firearm. The court responded to this argument, however, noting first that the Justice Department's position did not reflect the current state of the law. (App. at 28.) The court further determined that certain mitigating factors— namely, a non-violent history, a first-time offender status, and the absence of gun possession— were nonexistent in this case. (*Id.* at 29, 32, 33.) Therefore, the court concluded that Williams was undeserving of a sentencing variance.

We think that this explanation was sufficient. It is evident from the record that the district court listened to the arguments and considered the evidence and the defendant's personal circumstances. *See Rita v. United States*, 551 U.S. 338, 357-59 (2007). Because this explanation demonstrated the court's basis for its reasons, it matters little that the explanation was brief. *Id.* We therefore reject Williams's sentencing argument.

## III. CONCLUSION

For the foregoing reasons, Williams's conviction and sentence are AFFIRMED.